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National Association of Independent Insurers

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February 10, 2003

Docket Management
Room PL-401
400 Seventh Street, SW.
Washington, DC 20590

Re: Department of Transportation – National Highway Traffic Safety Administration {Docket No. NHTSA-02-13546; Notice 2} Event Data Recorders

Dear Administrator:

The National Association of Independent Insurers (NAII) is pleased to offer its observations and comments on the role of the National Highway Traffic Safety Administration (NHTSA) regarding the standardization and use of event data recorders (EDRs) in motor vehicles. NAII is offering several recommendations. First, we encourage your agency to take whatever steps are necessary to see that the full potential of EDRs is analyzed and understood, and that an appropriate inter-governmental initiative is then outlined to facilitate the realization of as many EDR benefits as possible. Second, we urge your agency to move forward on the task of developing data element and data retrieval standards for EDRs. Third, we believe that EDR data elements should be set with proper attention given to data uses beyond the scope of safety engineering or research. Fourth, in the interest of achieving greater regulatory flexibility, it would appear preferable to investigate a state role in setting standards for collection, storage and access rights to the EDR data. Our letter will expand on these and other related thoughts.

For the record, the National Association of Independent Insurers is a national trade group representing over 715 property/casualty insurance companies in the U.S. that write at least $112 billion in premiums throughout the nation. NAII member companies account for a 33 per cent share of the property-casualty insurance market. NAII affiliated insurers underwrite approximately $62 billion in personal auto insurance premiums (46 per cent of the U.S. market) and $8 billion in commercial auto insurance premiums (32 per cent of the U.S. market). Our client companies transact business in all 50 states, and they are a cross-section of the insurance industry. They include large national firms that write insurance throughout the country, small single state or niche market providers, mutual companies, stock companies, reinsurers, as well as surplus lines carriers. They insure accounts ranging from single, private passenger vehicles to interstate trucking firms or other commercial fleets so their interests in federal motor vehicle regulation are quite diverse.

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Safety Perspective

Let me underscore that NAII supports the points that were made in the written comments of the Insurance Institute for Highway Safety (reference their January 13, 2003, letter to Administrator Runge from IIHS Senior Vice President – Research Susan Ferguson). It is clear that IIHS believes that EDRs can play a major role advancing motor vehicle safety research. Like the Institute, NAII sees merit in moving the private market toward standardization, at least in the context of basic data collection and retrieval performance. On the other hand, NAII suggests that any regulatory standards be flexible enough to encourage manufacturers to "push the envelope", that is, to experiment and explore other data elements that may emerge in the future. We believe standards should be flexible enough to address manufacturer design concerns, encourage private sector competition, and facilitate cost-effective training. One technician should be able to retrieve and interpret EDR data regardless of the class of vehicle or the make and model. NAII recommends that EDR engineering be "mainstreamed" in a sense so that information systems technicians, regardless of their industry or field, all have the requisite skill sets to service an EDR, or at least to download and interpret its data. Our observation is predicated on the assumption that there could be broader use of EDR data in the future, and accordingly, a demand for greater access.

The IIHS also made a number of useful recommendations in relation to the data elements that could play the greatest role in advancing vehicular crash research. We support the Institute's suggestions. That organization's extensive experience in crash-testing motor vehicles over the last several decades has given them, like NHTSA, considerable insight on the factors and dynamics that affect driving, vehicle performance and in many cases, crash outcomes. We think the Institute has identified a number of relevant measures that should be recorded and collectible from EDRs in the future.

Another potential safety use of EDR data output that was touched on in the agency's Request for Comments release in the October 11, 2002, Federal Register relates to automatic crash notification (ACN) systems. As we understand it, the data captured by the EDR could be conveyed to hardware in the vehicle that in turn reports a collision or the likelihood of an injury to an outside emergency service unit or network. If data elements collected by the EDR could help a rescue team or paramedics better assess crash-related injuries or the likelihood of injuries, we trust the agency will be receptive to guidance from the ACN and related medical community on what data elements are critical.

NAII is not aware of research or studies that have conclusively proven what the societal payoffs that are derivable under an ACN network, however it is our understanding that we are at a very early stage in the development of the ACN infrastructure. Until there is a more robust network and more subscribers to OnStar and similar service providers, it may be premature to make definitive conclusions on the merits of ACN. Having EDRs that collect useful data for emergency responders would seem logical, therefore we trust the agency will see that data element standards incorporate the relevant measures.

Other Applications for EDR Data

NAII respectfully suggests one agency priority should be to see that other potential applications of the event data recorder are thoroughly analyzed. The focus of the Federal Register notice was decidedly safety oriented in nature. In addition to safety and vehicle engineering applications, however, other uses for the data unrelated to highway or vehicle safety may also be relevant. We encourage NHTSA as well as the vehicle manufacturer community to remain as open minded as possible. It may take some time before other stakeholder interests understand the potential utility of EDR data.

We will mention several of the possible areas in which EDR data might be of value to the property-casualty insurance sector. The observations that follow are offered as hypothetical illustrations of how EDR databases could be used. They are intended as a starting point for discussion, hopefully leading to more in depth analysis and evaluation.

One of the EDR applications of interest to NAII is in improving accident reconstruction and the allocation of negligence or responsibility among the drivers and other parties involved in a collision. In each of the 50 states, the accident reparations system is responsible for compensation of injured parties and in many cases, the assignment of fault. Under the tort liability system rules, it is often difficult to settle issues of fact relating to an accident. In some instances, the report from the police officer on the scene may be helpful, but in many cases the officer did not witness the crash so details are often very sketchy or ambiguous. There may not be any witnesses, or if there are, the witness' observations may conflict or be unreliable. In short, the limitations of current fact-finding hampers efficient insurance claim administration, creates expensive and often flawed discovery procedures during litigation, and unduly complicates the resolution of disputes arising out of motor vehicle crashes.

If the EDR recorded data elements that could be useful in analyzing an accident and the actions of the various drivers involved in the moments before the collision, the data it yielded could be extremely beneficial. It could help accident investigators and claim adjusters separate fact from fiction and lead to more equitable decisions that affect litigation and liability arising from the case. A big payoff could be in the reduction in lawsuits arising out of personal injuries sustained when using a motor vehicle. In the same vein, it would be our expectation that the availability of data downloaded from the EDR could conceivably reduce the expenses of litigation associated with auto injury cases. The stakeholders that could benefit from the use of EDR data in accident reconstruction and dispute resolution settings are many. They would include law enforcement agencies, insurance companies, accident investigators and engineers, municipalities, lawyers, and those charged with administering the court systems (both civil and criminal/traffic offenses). There are a handful of EDR data elements that could be of value to those involved in accident reconstruction and the injury claiming process.

Injury compensation determinations can be affected in some states depending on whether a motorist was wearing a seatbelt at the time of a collision. In a number of states, the failure to wear a seatbelt could result in a reduction in compensation. In addition to seatbelt usage, there are other data elements that could be influential factors in ascertaining whether driver negligence contributed to a collision. There are many kinds of factual issues that become relevant when a

personal injury suit is filed. Many cases could be resolved more expeditiously and efficiently if key facts were known. Illustrations of EDR data elements that could provide factual detail relating to the circumstances immediately prior to a crash include:

- Seatbelt usage at time of crash;
- Speed or direction of vehicle at the time of collision;
- Braking action or lack thereof preceding a collision;
- Whether vehicle navigation (headlights, tail-lamps, etc.) lights were illuminated;
- Position of the gear selector (e.g., whether a special power distribution feature such as traction control, an active handling system, stability control, four wheel drive, etc. had been engaged before the crash);
- Whether a turn signal indicator had been activated immediately prior to crash;
- Exact time at which a collision/occurrence took place; and
- Last action/position of the driver before the collision.

If data element standards for EDRs are set by NHTSA, NAII suggests that they include as many of the above measures as possible. The data captured could be of value to both the engineering and research community as well as to those responsible for dealing with the economic consequences of vehicle collisions.

We would anticipate that those charged with enforcing traffic laws and prosecuting offenders might be interested in evaluating the use of EDR data for reasons similar to those outlined in the above paragraphs. Assuming it recorded the appropriate data elements, event data recorders could provide the information necessary to corroborate circumstantial evidence of traffic law violations.

There may be other insurance-related applications associated with the EDR in the future. One of those relates to tracking how many miles a vehicle is driven over some span of time and where or how the vehicle is used (e.g., whether more miles driven are at a steady speed or whether driving patterns are more stop-and-go). In the future, it is conceivable that some insurance companies will be interested in having access to vehicle mileage records that could independently verify information supplied by a policyholder. "Miles driven" is a common rating factor but it does not carry much weight because the reported miles driven are often difficult to verify. Conventional wisdom suggests that those who drive more miles have a greater statistical chance of being involved in a collision. In some instances, however, greater miles driven may be offset by factors such as where a vehicle is driven and how a vehicle is driven. For example, a motorist making extended daily commutes at high speeds might nevertheless present a lower risk profile than a motorist that drove significantly fewer miles, but drove on busy city streets in stop-and-go conditions rather than on limited access roads or interstates in rural areas. The convergence of EDR technology and on-board GPS navigation systems could bring more reliable mileage-based insurance rating programs closer to reality.

If there is to be a future in mileage-based auto insurance rating alternatives, it may take several significant developments. First, the use of EDR and GPS technology on a standardized basis would seem desirable. Second, there will have to be greater market acceptance and consumer demand for these products/services. Lastly, access to the EDR and GPS data by third party users will have to be accommodated in some manner. The access issue is probably twofold in nature,

one dimension relating to the ease of physical access to the EDR unit and the procedure of retrieving (i.e., downloading) data. The second factor may require a paradigm shift in privacy concepts and privacy expectations. Our association is hopeful that agencies with jurisdiction over EDRs such as NHTSA will adopt regulatory policies that do not foreclose these developments from taking place.

The expanded use of EDR data (outside the safety engineering field) depend on there being broader access to the recorder, and NAII offers several observations later with respect to the privacy interests that may be a complicating factor to that access.

Other Issues

There were several topics raised in the Federal Register Notice in October that merit a comment. One concerns the question of whether all EDRs should be designed alike and meet the same set of standards. While not offering a recommendation per se, NAII believes that NHTSA has ample reason to evaluate whether separate EDR standards for these vehicle classes are warranted. There are significant differences in size, weight, handling characteristics, driver licensing-vehicle registration standards, financial responsibility requirements, and in the regulatory objectives in general etc. between large trucks and private passenger automobiles. In view of the safety risk posed by large trucks, or at least the public perception of that risk, it would seem reasonable that they have to meet a more rigorous EDR standard.

Another subject that was highlighted in NHTSA's Federal Register Notice related to complications that could arise as the result of privacy interests. Before formulating our thoughts on this issue, NAII reviewed the Summary of Findings from the NHTSA EDR Working Group. A variety of views appear to prevail on the privacy interests linked to the data collected in the event data recorder. Some legal barriers may exist that cannot be easily circumvented. The federal Privacy Act of 1974 appears to be one such obstacle, barring a federal agency from releasing EDR data without the consent of the person to whom the information applies. In our view, the potential applications associated with event data recorder information are so far-reaching and the payoffs so promising, a thorough public policy analysis and legal review should be undertaken before any summary conclusions are reached that limit the use of EDR output to safety research. The framers of the U.S. Constitution could not possibly have foreseen today's information technology nor could they have foreseen the complexity and inefficiency of our institutions today either. Accordingly, it would be too easy in our minds to summarily conclude that the Fourth and Fifth Amendments to the U.S. Constitution block more innovative uses of EDR information. NAII believes that a more expansive and fresh review of the privacy issues raised by EDRs should be undertaken. We encourage NHTSA to explore the feasibility of charging a governmental-private sector task force to undertake a comprehensive study of the privacy issues associated with the event data recorder.

NAII is concerned that privacy concerns are being overstated. For example, is it reasonable for a motorist to expect that his privacy interest in how he drives is superior to the interest of the community at large and its elected officials to protect the public safety? There has to be a balancing of interests. When citizens use the court system, they are bound by its rules. One of those rules requires that each party in the litigation is entitled to discover all pertinent

information relating to the controversy or dispute in the possession of the other party. Are discovery rules to be waived in the context of EDR data? On what legal ground? Consider the information that is purportedly cloaked with a privacy interest. EDRs do not record or monitor speech, that is, the conversation of a driver or other vehicle occupants. Furthermore, EDRs do not continuously record or monitor vehicle functions. At present, they are engineered to record only several seconds of information prior to an event and then the data correlating to the actual crash pulse. Under the standard insurance contract, when a policyholder is sued, the insurance company is contractually bound to defend their insured. The insured however is also contractually bound to cooperate with the insurer in the defense of the claim. This contractual stipulation is well grounded in the common law of most states. NAII believes that this contractual consideration may also contemplate that an insured consent to the release of EDR data in order to fulfill this obligation. These may seem like unrelated concepts, but our point is simple. We fear that privacy is becoming a red herring issue that nevertheless may persuade policymakers to prohibit the full use of event data recorders.

If anything, new technology often demands new law and new legal concepts. The Internet is one recent illustration. A decade ago, few people realized that in the near future legal obligations could be created through digital signatures. NHTSA and other policymakers should refrain from making premature and closed-minded conclusions about EDR data, EDR ownership rights, and corresponding privacy interests. There may be a compelling reason for legislative bodies, at the state if not the federal level, to hash out a new statutory scheme that would address the privacy issues in innovative yet respectful ways that balance the competing interests of the individual and broader societal institutions. NAII would encourage NHTSA to continue its dialogue with EDR stakeholders and to expand the participants if possible to get an even broader viewpoint. NHTSA's goal should be to promote more inclusion of state level governmental and private sector interests (e.g., motor vehicle regulators, law enforcement authorities, the legal profession, the private insurance sector, the trauma care-automatic crash notification stakeholders, after-market as well as OEM manufacturer-suppliers) so that debate on these issues is as well rounded and uninhibited as possible. In our view, a legislative solution to EDR data collection and access should be crafted at the state level, the governmental tier where so many fundamental motor vehicle and driver compliance programs are currently administered. NHTSA should therefore assert limited jurisdiction in the context of EDR rulemaking actions.

NAII commends the NHTSA for proceeding slowly but deliberately in moving forward on the regulation of event data recorders. Thank you for permitting interested parties the opportunity to share their views on this subject.

Yours respectfully,

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